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No. 03-218

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

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AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, AUTHORS GUILD, CALIFORNIA MUSEUM OF PHOTOGRAPHY/UNIVERSITY OF CALIFORNIA AT RIVERSIDE, PETER LUDLOW, SAFER SEX INSTITUTE, AND THE SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES

ALL PARTIES CONSENT TO THE FILING OF THIS *AMICUS* BRIEF

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BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

Although this Court held in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) (*Ashcroft I*), that the Child Online Protection Act of 1998 ("COPA"), 47 U.S.C. § 231, was not substantially overbroad in its reliance on "community standards," the Court did "not express any view as to whether COPA suffers from substantial overbreadth for other reasons . . . ." 535 U.S. at 585. On remand, the Court of Appeals held that respondents are likely to establish that COPA is substantially overbroad. *ACLU v. Ashcroft*, 322 F.3d 240, 266-71 (3d Cir. 2003). Because COPA restricts Internet speech available to adults to only that which Congress and prosecutors may believe is appropriate for children, *amici*[1] urge the Court to affirm the holding of the

1. This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

Court of Appeals that COPA impermissibly infringes rights protected by the First Amendment and therefore is substantially overbroad.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are businesses, organizations, and individuals that use the World Wide Web to engage in speech and other forms of expression on wide-ranging subjects and who require and believe in freedom of expression in connection with their use of the Web. Some are individuals (or organizations representing individuals) for whom the World Wide Web provides an unprecedented opportunity to publish and disseminate speech on issues that they consider important. A complete list of *amici*, with descriptions of their uses of the World Wide Web, their interest in this litigation, and the impact that enforcement of COPA would have on their varying uses of the Web, is set forth in a more detailed Statement of Interest of *Amici Curiae* that is appended to this brief. *Amici's* use of the Internet illustrates COPA's substantial overbreadth. As users of the World Wide Web, *amici* are directly affected by the deterrence of speech that COPA's overbreadth causes.

SUMMARY OF ARGUMENT

COPA imposes criminal and civil penalties for any communication on the World Wide Web that includes material deemed "harmful to minors" if the communication is related to a commercial purpose. 47 U.S.C. § 231(a)(1). COPA's definition of what is "harmful to minors" is broad enough to encompass a substantial amount of material that has legitimate First Amendment value for adults, and COPA contains insufficient protections to remove that speech from its sweep. Accordingly, COPA is substantially overbroad because it cannot achieve its stated ends without simultaneously inhibiting or prohibiting constitutionally protected and socially valuable speech.

This brief illustrates COPA's overbreadth as it applies to *amici* and others like them.[2] To do so, it examines three categories of Internet speech: (1) *Sexuality information* — by threatening dissemination of speech about sex, COPA deprives adults of information about an essential element of humanity; (2) *Artistic and intellectual expression* — by subjecting artistic works to inherently subjective determinations about whether they have value for children, COPA chills creativity and culture; and (3) *Educational materials* — by creating a danger of prosecution for both the provision and receipt of pedagogical tools, COPA inhibits interactive intellectual discussion and learning.

ARGUMENT

In Criminalizing Speech That Is Appropriate for Adults, COPA Is Unconstitutionally Overbroad.

COPA, like the Communications Decency Act before it, "effectively suppresse[s] a large amount of speech that adults [have] a constitutional right to receive and to address to one another." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997). A statute violates the First Amendment if

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2. To illustrate COPA's substantial overbreadth, this brief cites web pages of *amici* and others that may be endangered by the statute. For the Court's convenience, *amici* are seeking leave to lodge with the Clerk a CD-ROM that contains an electronic version of this brief in portable document format (.PDF). The citations to web pages on that disk are hyperlinked to cached copies of the cited web pages that are included on the CD-ROM. All of those web pages were cached to the disk between January 8–12, 2004, and *amici's* citations are intended to be to the versions of those web pages as they existed on those dates. It should be noted that links within these cached pages are live and, when activated, will take the reader beyond the pages stored on the CD-ROM to the Internet as it exists on the date of access (rather than on the date the cites were cached).

it proscribes more speech than is necessary to further a compelling governmental interest. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). A classic example of such unconstitutional overbreadth is a law that restricts adults to only speech that is deemed fit for children. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001); *Reno*, 521 U.S. at 874; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 755, 760 (1996); *Sable*, 492 U.S. at 128; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957). COPA is just such a statute. Because COPA's overbreadth is both "real" and "substantial," *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), COPA is unconstitutional.

Amici do not challenge Congress' asserted interest in helping parents who wish to shield their children from objectionable material on the Internet. But such an interest, even if substantial, cannot justify COPA's content-based restriction of speech for adults. COPA criminalizes (with a $50,000 fine, imprisonment for up to six months, or both) "*any* communication for commercial purposes that is available to *any* minor and that includes *any* material that is harmful to minors." 47 U.S.C. § 231 (emphasis added).[3]

In its ruling on the constitutionality of COPA, the Court of Appeals expressly considered whether the statute was substantially overbroad, and held that respondents were likely to prove that it is. 322 F.3d at 266-71. The court concluded: "the statute is substantially overbroad in that it

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3. COPA states: "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both." 47 U.S.C. § 231(a)(1). The rest of Section 231(a) provides for increased fines for intentional violations and allows for civil penalties.

places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such speech." 322 F.3d at 266. In reaching this conclusion, the Court of Appeals relied heavily on examples submitted by the *amici* filing this brief. *See id.* at 267–68. This unconstitutional overbreadth provides an independent basis for invalidation of COPA. *See id.* at 271.

In attempting to avoid the CDA's constitutional pratfalls, Congress limited COPA's reach to material on the World Wide Web that (1) is published "for commercial purposes," and (2) meets a three-part definition of speech that is "harmful" to "minors" under 17 years of age.[4] Neither of these purported limitations saves COPA from being unconstitutionally overbroad because an enormous amount of content on the Internet falls *within* these limitations and thus potentially is subject to prosecution under COPA even though it *also* has serious value for adults.

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4. COPA states, at 47 U.S.C. § 231(e)(6):

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that —
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Amici do not believe that they publish material that anyone should deem "harmful to minors." They do believe, however, that some of their content and that of others like them may be within the reach of COPA, even though it includes material of legitimate value for adults (and, in many cases, for children too) under the First Amendment.[5] Because there is no reliable way for Web content providers

5. COPA's "commercial purposes" limitation does not exempt any of the examples used in this brief from the statute's reach. Some of the examples are from purely commercial web sites that seek to make a profit by selling goods and services (although none even approach being sites of the "commercial pornographers" that were Congress' apparent target); others rely on advertising to generate a profit or, at least, to provide financial support for the web site's activities; others seek and receive financial support through their web sites indirectly. Even though some of the *amici* are non-profit organizations that adhere strictly to guidelines under federal and state law for maintenance of that status, COPA does not provide a bright-line defense that removes from its application all such organizations as defined, for example, by the Internal Revenue Code, 26 U.S.C. § 501(c). 322 F.3d at 256 n.18. Rather, COPA's convoluted definition of the "commercial purposes" needed for liability mixes ideas about whether the publisher "devotes time, attention, or labor" to making communications, has an "objective" of making a profit "as a result of such activities," does or does not necessarily make a profit, does or does not necessarily lack other sources of income, and knowingly posts or solicits material for publication. *See* 47 U.S.C. § 231(e)(2). This definition is so unclear that *amici* have no assurance that they are not covered by it if, for example, they allow sponsorships on their web pages, share receipts from sales made by partners under linking agreements, or solicit contributions to fund their web sites — even though such activities strictly conform to the tax guidelines for non-profits. As Justice Kennedy noted in *Ashcroft I*, "The plain text of the Act . . . seems to apply even to speech provided for free, so long as the speaker merely hopes to profit as an indirect result." 535 U.S. at 600.

to distinguish between what is available to minors and what is available to adults (aside from costly screening measures that themselves deter speech and that are not appropriate for information-providing web sites),[6] the only viable option is for content providers to restrict all speech on the Web to that deemed by courts (or prosecutors) to be appropriate under COPA for minors. However, the "overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is *prohibited or chilled* in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (emphasis added).

This brief discusses some of that threatened material from *amici*'s own web sites and from similar sites published by others to show the wealth of Web content, far outside the realm of commercial pornography, that is within COPA's overbroad reach. In so doing, *amici* seek to provide the Court with real examples supporting the Court of Appeals' conclusion that "COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to materials that is obscene for minors." 322 F.3d at 266-67.

A. COPA Is Substantially Overbroad Because It Restricts Information About Sexuality.

The First Amendment does not protect only information that the majority of Americans like or approve. *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring). Few subjects are as likely to cause discomfort as frank discussions of sex, and particularly discussions of sexual topics that are outside of the mainstream. And few subjects are as likely to raise concerns as such discussions in

6. *Amici* rely on the brief of respondents for explanation of why the Government's "blinder rack" analogy does not apply here and why COPA's designated means of screening minors from an audience impose unconstitutional restraints on free speech.

the presence of minors. Most Americans agree that it is appropriate to protect minors from material that is unsuitable for them. But COPA's restrictions on sexual speech to protect minors are likely to prevent *adults* from engaging in a large amount of Internet discourse about sexuality that is legitimate and valuable. For that reason, COPA is unconstitutionally overbroad.

To be "harmful to minors," a web communication must depict, describe, or represent a sexual act or sexual contact or must exhibit genitals or a post-pubescent female breast. 47 U.S.C. § 231(e)(6)(B). That requirement can encompass a broad range of sexual information, from basic education about procreation, to "safe sex" instructions for prevention of pregnancy or sexually-transmitted diseases, to health information about gynecological or urological issues. A wealth of such information is available on the World Wide Web.[7]

Many segments of today's society deplore the dissemination of sexual information to minors and consider any sexual practices by minors (or any unmarried persons) sinful, and thus "harmful" *per se*. *See generally* "Americans Search for New Sexual Ethic," *San Francisco Chronicle*, p. A1 (Nov. 29, 1994) (noting disapproval of teenage sex among Baptists, Buddhists, Catholics, Methodists, Mormons, Muslims, and Jews, among other religions, despite changing social mores).[8]

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7. *See, e.g.*, The Body, "Ask the Experts About Safe Sex, Prevention & Transmission," *http://www.thebody.com/Forums/AIDS/SafeSex/index.html* (answers to questions concerning safe sex practices); Salon.com, "Sex slave," *http://www.salon.com/sex/feature/2001/05/07/prostate/* (wife's account of coping with husband's sexual dysfunction following prostate surgery); The Male Genitalia Guide, "Testicular Self-Exam," *http://www.afraidtoask.com/members/testicle.html*.

8. *See also* E.K. Meister, "Sex Education Overhauled To Promote 'Abstinence Only,'" *Cincinnati Enquirer*, Mar. 29, 2001,

In this atmosphere, the threat of prosecution cannot readily be dismissed.

Two vagaries within the text of the statute heighten this threat. The first is the definition of "minors" as all persons aged 16 or younger. 47 U.S.C. § 231(e)(7). Even the Government appears to agree that providing sexual information to *some* of these minors has value. *See* Pet. Br. at 43-44. The need of American adolescents for accurate information about sex is well known.[9] But at what age is sexual information appropriate?[10] Whatever the value of providing

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http://www.enquirer.com/editions/2001/03/29/loc_sex_education.html; ChristianAnswers.net, "My Boyfriend Wants To Have Sex . . .," *http://www.christiananswers.net/q-dml/dml-y010.html*. Indeed, since 1996, Congress has conditioned sex-education funding on use of an abstinence-only curriculum. *See* Social Security Act § 531, 42 U.S.C. § 710; Rethinking Schools Online, "Federal Law Mandates 'Abstinence-Only' Sex Ed," *http://rethinkingschools.org/archive/12_04/sexmain.shtml* (including comments from *amicus* Sexuality Information and Education Council of the United States).

9. In 1999, the most recent year for which statistics are available, more than 850,000 American teenage pregnancies were completed — 30% of them by abortion. S.K. Henshaw, "U.S. Teenage Pregnancy Statistics with Comparative Statistics for Women Aged 20–24," *http://www.agi-usa.org/pubs/teen_stats.pdf*, at 3 (Alan Guttmacher Inst. 2003). Three million American teenagers acquire a sexually-transmitted disease each year. Alan Guttmacher Inst., "Facts in Brief: Teen Sex and Pregnancy," *http://www.agi-usa.org/pubs/fb_teen_sex.pdf*, at 1 (1999).

10. The Alan Guttmacher Institute, a prominent reproductive health research organization, reports: "Teenagers in the United States are more likely to have sexual intercourse before age 15 and have shorter and more sporadic sexual relationships than teenagers in Canada, France, Great

accurate sexual information to older teenagers, that value certainly is not as great for toddlers. But COPA makes it illegal to provide "harmful" material to "*any* minor." 47 U.S.C. § 231(a)(1). Accordingly, a web site has no way of knowing whether its dissemination of material to adults and older teens may be subject to prosecution because young children potentially are in the audience. The Government's answer is to disregard the younger children and rewrite the statute to exempt from liability any content that "has serious value for normal 16-year-olds." Resp. Br. at 30. But nothing in the statute supports that limitation, and web publishers are left to worry about the threat.

The level of threat varies with the local community. In *Ashcroft I*, this Court did not determine whether the "contemporary community standards" by which harmful material is judged under COPA are local or national, though members of the Court recognized that even a national standard will be applied differently by jurors in different localities. *See* 535 U.S. at 576-77 (opinion of Thomas, J.); *id.* at 586-87 (O'Connor, J., concurring); *id.* at 590-91 (Breyer, J., concurring). This is a significant problem for an international medium that has no feasible way of distributing its content to some communities but not others. As Justice Kennedy observed about COPA in *Ashcroft I*, "if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web." 535 U.S. at 596. There is no question that sexual attitudes vary throughout the United States. While state statistics on sexual activity are hard to come by, teenage pregnancy information provides a useful surrogate. In 1996, the pregnancy rate varied from a high of 26% of women aged 15–19 in Washington, D.C. and 14% of such women in Nevada to a low of 5% in parts of the Midwest. Alan Guttmacher Institute, "Teenage Pregnancy: Overall Trends and State-by-State Information," *http://www.agi-usa.org/pubs/teen_preg_stats.html* (1999). It is no secret that web information about sex is likely to meet a different reception in rural Oklahoma than it will in San Francisco.

Britain and Sweden." Alan Guttmacher Institute, "Facts in Brief: Teenagers' Sexual Reproductive Health," *http://www.agi-usa.org/pubs/fb_teens.pdf* (2002). A quarter of all U.S. teenagers have had sexual relations by age 15; half have done so by age 17. Alan Guttmacher Inst., "Facts in Brief: Teen Sex and Pregnancy," *http://www.agi-usa.org/pubs/fb_teen_sex.pdf*, at 1 (1999).

Against this background, the Court of Appeals concluded that COPA is substantially overbroad in its restriction of speech about sexual health and cited as one example of threatened material the web site of *amicus* Safer Sex Institute, *http://www.safersex.org/condoms/how.to.use/*. 322 F.3d at 268. That site includes explicit drawings and text regarding condom use, and because the drawings "exhibit . . . the genitals" they are within COPA's literal scope. Whether they are "harmful to minors" is open to debate, depending on the minor's age and the community in which they are viewed. The publisher therefore is left to wonder about (and fear) potential liability.

The Government appears to suggest that there is nothing to fear because safe-sex information is valuable for older minors. *See* Pet. Br. at 32-34, 43-44. But even assuming (despite the absence of any language in the statute to support the assumption) that *some* information about sexual health would be protected from prosecution under COPA, there are categories of such information that necessarily are more vulnerable. Consider the following:

Information about obtaining sexual pleasure. Heterosexual sex is respected in all cultures as an act of procreation. But sexual contact also is a source of intense physical pleasure. From time immemorial, men and women have explored ways to fulfill and enhance their sexual feelings — from experimentation with love potions and aphrodisiacs, to invention of new techniques and positions, to study of ana-

tomical and physiological sources of stimulation. Information regarding the importance of sexual satisfaction to healthy relationships has value for adults, as medical and other professionals frequently have acknowledged. *See, e.g.*, Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* §§ 302.71, 302.79 (1994).

The World Wide Web is a significant source of information about ways of obtaining sexual satisfaction.[11] But does

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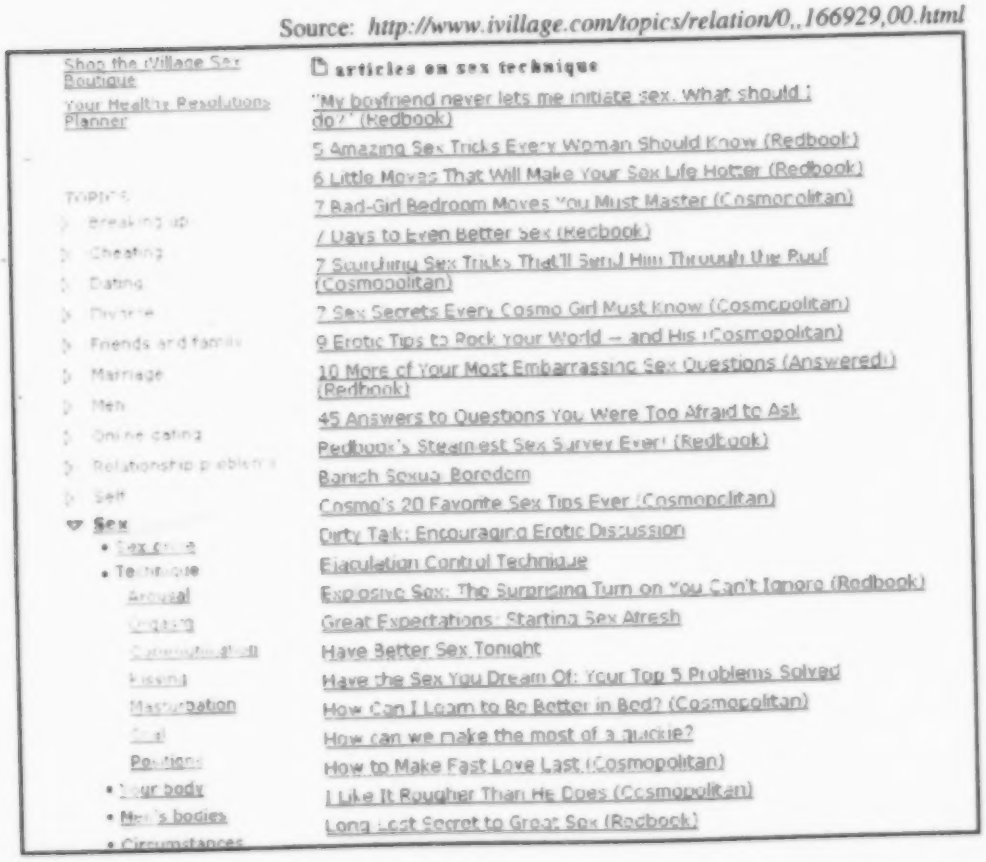
11. A single image from just one part of the index on just one web site (iVillage.com, "Relationships: Sex technique," *http://www.ivillage.com/topics/relation/0,,166929,00.html*) hints at the extraordinary range of information available:

Source: *http://www.ivillage.com/topics/relation/0,,166929,00.html*


Shop the iVillage Sex Boutique
Your Healthy Resolutions Planner
articles on sex technique
"My boyfriend never lets me initiate sex. What should I do?" (Redbook)
5 Amazing Sex Tricks Every Woman Should Know (Redbook)
6 Little Moves That Will Make Your Sex Life Hotter (Redbook)
7 Bad-Girl Bedroom Moves You Must Master (Cosmopolitan)
7 Days to Even Better Sex (Redbook)
7 Scorching Sex Tricks That'll Send Him Through the Roof (Cosmopolitan)
7 Sex Secrets Every Cosmo Girl Must Know (Cosmopolitan)
9 Erotic Tips to Rock Your World -- and His (Cosmopolitan)
10 More of Your Most Embarrassing Sex Questions (Answered!) (Redbook)
45 Answers to Questions You Were Too Afraid to Ask
Redbook's Steamiest Sex Survey Ever! (Redbook)
Banish Sexual Boredom
Cosmo's 20 Favorite Sex Tips Ever (Cosmopolitan)
Dirty Talk: Encouraging Erotic Discussion
Ejaculation Control Technique
Explosive Sex: The Surprising Turn on You Can't Ignore (Redbook)
Great Expectations: Starting Sex Afresh
Have Better Sex Tonight
Have the Sex You Dream Of: Your Top 5 Problems Solved
How Can I Learn to Be Better in Bed? (Cosmopolitan)
How can we make the most of a quickie?
How to Make Fast Love Last (Cosmopolitan)
I Like It Rougher Than He Does (Cosmopolitan)
Long-Lost Secret to Great Sex (Redbook)
TOPICS
Breaking up
Cheating
Dating
Divorce
Friends and family
Marriage
Men
Online dating
Relationship problems
Self
Sex
Sex crimes
Technique
Arousal
Kissing
Masturbation
Oral
Positions
Your body
Men's bodies
Circumstances

See also, e.g., QuickCondoms.com, "Safety Girl: How To Find the G Spot," *http://www.quikcondoms.com/content.jsp?id*

such information have serious value for minors under COPA, thus allowing it to be displayed on the Internet? Any hedonistic view of sexuality is a source of moral disapproval among large segments of the American public, and transmission of such information to children therefore may be viewed by many as no better than transmission of disease. While a prosecutor might well find value for minors in instructing about how to prevent AIDS or how to do self-examinations for breast or testicular cancer, he or she may not agree on the value of instructions on how to provide pleasure to another young man or woman on date night. Even application of the "older minor" standard that the Government would read into the statute would not exclude such Internet content from COPA's reach, or remove the chill that content providers inevitably would experience when considering whether to post such content on the Internet. The web sites providing legitimate information about sexual satisfaction therefore are threatened.

Sexual devices and related topics. In *Williams v. Pryor*, the Eleventh Circuit considered the constitutionality of an Alabama statute that makes it unlawful to distribute (but not to possess or use) "any device . . . useful primarily for the stimulation of human genital organs." *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001). The court noted expert opinions that such devices are used for "standard medical and psychological purposes," including "marital and non-marital sexual relationship counseling," and it remanded to determine whether the ban unconstitutionally infringed on the rights of adults challenging the statute. 240 F.3d at 947, 955-56. On remand, the district court held that it did.

=73&ch=safety_girl; iVillage.com, "Sex Coach: Techniques for Sensational Sex," *http://www.ivillage.com/relationships/experts/sexcoach/articles/0,9632,166929_25676,00.html*; Body Positive, "Sex for People Living with HIV," *http://www.thebody.com/bp/hivsex.html* (site discussing how HIV-positive individuals can enjoy safe, pleasurable, sexual activities).

BEST AVAILABLE COPY

Williams v. Pryor, 220 F. Supp.2d 1257, 1259-60 (N.D. Ala. 2002), *appeal pending*, No. 02-16135-DD (11th Cir.).[12] As both the district court and the Eleventh Circuit acknowledged, there is a legitimate basis for providing information to adults across the nation about therapeutic sexual devices, and the First Amendment would not permit that information to be banned. But, at least in the view of the Eleventh Circuit, there is no legitimate reason for minors to have access to such devices, and under that reasoning other courts and prosecutors may well conclude that there is no serious value in providing information about such devices to minors. COPA thus would ban the information, restricting adults' access to it.

Separate from but related to the question of therapeutic sexual devices is that of sexual physical enhancements. Whether for therapy, accident reconstruction, or simple vanity, many Americans undergo procedures or treatments each year for such things as breast augmentation or penile

12. A few other states have statutes like that in Alabama. *See, e.g.*, Colo. Rev. Stat. § 18-7-101; Ga. Code Ann. § 16-12-80; Kan. Stat. Ann. § 21-4301; La. Rev. Stat. Ann. § 14:106.1; Miss. Code Ann. § 97-29-105; Tex. Penal Code Ann. § 43.21, 43.23; Va. Code Ann. § 18.2-373. Courts have been divided on their constitutionality. *See, e.g., State v. Brennan*, 772 So.2d 64 (La. 2000) (state's unqualified ban on sexual devices unconstitutional as bearing no rational relationship to a legitimate state interest); *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (statute proscribing "obscene devices" impermissibly burdened right to privacy); *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990) (same); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985) (statute did not infringe privacy rights); *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed*, 435 U.S. 982 (1978) (statute valid). These disparities demonstrate that, even if there is a national community standard by which all Internet content must be measured, commercial web sites seeking to sell, advertise, or even discuss sexual devices may fall within COPA's reach.

enlargement, and the Web is full of sites about the processes. Some of those sites even contain before-and-after photos and pictorial testimonials.[13] Adults have a right to information about these procedures. As the Court said with respect to tobacco sales in *Lorillard*, 533 U.S. at 564, "it is no less true that the sale and use of tobacco products by adults is a legal activity" and therefore "[w]e must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products." If, on the other hand, this information is not of serious value for minors, COPA would prevent adults from receiving it via the Internet. In *Lorillard*, the Court held that, despite the state's interest in protecting against underage tobacco use, such a result was impermissible for information about smokeless tobacco and cigars. The same must hold true for lawful medical information, whether or not of a sexual nature.

Non-traditional sexual practices. In December 2000, the Centers for Disease Control and Prevention reported that "oral sex is commonly practiced by sexually active male-female and same-gender couples of various ages, including adolescents." "What You Should Know About Oral Sex," *ftp://cdcnpin.org/Updates/oralsex.PDF*. The report warned of misconceptions regarding the practice, including the fact that many adolescents (perhaps influenced by news reports during the Monica Lewinsky controversy) "do not consider it to be sex" and "therefore they may use oral sex as an option to experience sex while still, in their minds, remaining abstinent." *Id.* The report warned further of risks of transmission of the AIDS-causing virus HIV if the practice is not followed safely. *Id. See also* "Special Report — Oral Sex Among

13. *See, e.g,* Implantforum.com, "All About Breast Augmentation: Breast Implant Before and After Photos," *http://implantforum.com/pics/pics.html*; E.D. Whitehead, "New York Phallo," *http://www.penile-enlargement-surgeon.com/presentation.html*.

Adolescents: Is It Sex or Is It Abstinence?," *Family Planning Perspectives*, Nov./Dec. 2000, at 298-304, *http://www.agi-usa.org/pubs/journals/3229800.pdf*.

Numerous web sites provide information about oral and other non-vaginal sexual conduct, including instructions and safety pointers.[14] Clearly, this is legitimate health information for many adults. Just as clearly, however, this entire subject is repulsive and anathema to others. As the Supreme Court of Georgia noted when it struck down that state's sodomy law in *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998), "many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible." States that have legalized these practices have done so only if there is consent, and this Court's declaration in *Lawrence v. Garner*, 123 S. Ct. 2472 (2003), that punishment of private sexual conduct is unconstitutional was limited to private *consensual* activity. Minors usually are presumed incapable of consent (though the age of consent varies greatly from state to state). *Compare, e.g.*, Ore. Rev. Stat. § 163.415 (age 18) *with* S.C. Const., Art. III § 3 (age 14). Accordingly, information about these practices remains a likely candidate for prosecution under COPA because it may not be deemed of value to minors. If so, adults will be proscribed from readily obtaining information to which they are entitled under the First Amendment.

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14. *See, e.g.*, QuickCondoms.com, "How to Give Oral Sex to a Man — Beginner," *http://www.quikcondoms.com/content.jsp?ch=sexpert&id=85*; Go Ask Alice!, "Oral Sex With A Condom — Does It Feel Good to the Recipient?," *http://www.goaskalice.columbia.edu/1614.html*; T. Cox, "Oral Sex: Tips for Her and Him," *http://www.ivillage.com/relationships/experts/experts_by_month/articles/0,9632,166929_92901,00.html*.

Another practice widely covered online is auto-erotic behavior.[15] There should be little doubt that many would deem such information of no value to minors. In 1994, the Surgeon General was forced to resign because she said that masturbation was "part of human sexuality and it's a part of something that perhaps should be taught" in connection with comprehensive health education.[16] Yet, there also should be little doubt that it is a topic of legitimate value. *See* Gina Kolata, *The Rule Dr. Elders Forgot: America Keeps Onan in the Closet*, *New York Times*, Dec. 18, 1994, Sec. 4, p. 5 (reporting survey findings that about 60% of adult males, 40% of adult females, 90% of teen-age boys, and 65-70% of teen-age girls had masturbated within year preceding

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15. *See, e.g.*, HIV and You, "Safer Sex: Vibrators," *http://www.hivpositive.com/f-HIVyou/4-SaferSex/4-Vibrators.html*. A. Semans, "How to Masturbate (for Women)," *http://sexuality.about.com/cs/sexualtechnique/ht/howtomasturbate.htm*. The web presents a ready source that users may consult anonymously to obtain knowledge about such a private topic. For one example of an anguished teenager's inquiry to a university web site inviting questions about health topics, *see* Go Ask Alice!, "Bed Humping = Bad Habit?," *http://www.goaskalice.columbia.edu/1720.html* ("I've had a 'bed humping' problem for almost three years now. . . . This web site seems like the only place that can help me right now. I can't talk to any of my family or friends about it. It would be too embarrassing, and I would be afraid. . . . Am I a weirdo or a pervert for doing it?").

16. *See* Center for Reproductive Law and Policy, "On the Hill: Surgeon General Resigns Under Pressure from White House," *Reproductive Freedom News*, Dec. 16., 1994, vol. III, No. 22, p. 5-6; E.C. White, "Grace Under Fire," *San Francisco Chronicle*, May 21, 1995, at M3 (interview with Dr. Joycelyn Elders). *See also* "Simi Valley Church's Program Shocks Some in Community," Associated Press, Mar. 18, 2001 (available on LEXIS; controversy caused by California church program teaching high-school-age minors about sexual topics, including masturbation).

article). If *Williams* is correct that a state has a legitimate interest in preventing auto-erotic conduct, at least by minors, 240 F.3d at 949-50, it may follow that minors can be barred from receiving information about it. That would cloak such information from adults as well.

Homosexuality. This Court is no stranger to the emotionally-charged issues relating to gay rights. Less than 20 years ago, the Court upheld Georgia's criminal sodomy law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Last Term, the Court overturned that decision and held that a Texas statute criminalizing sexual contact between members of the same sex "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Garner*, 123 S. Ct. 2472, 2484 (2003). News accounts following the *Lawrence* decision (and the debate about gay marriage that has followed in its wake) make clear that the public remains divided on this issue. *See, e.g.*, K.Q. Seelye & J. Elder, "Strong Support Is Found for Ban on Gay Marriage," *New York Times*, Dec. 21, 2003, at 1. Justice Scalia's discussion in his dissent in *Romer v. Evans*, 517 U.S. 620, 644-48, 652 (1996), of a "culture war" between "those who wish to retain social disapprobation of homosexuality" and those who do not remains an apt description of the divide in American society.

Despite this Court's holding in *Lawrence* that the Government may not criminalize or otherwise intrude upon private, consensual sexual activity between adults, it is unlikely that information on the Web about homosexual practices and lifestyles would be viewed uniformly as having serious value for minors. To the contrary, such content is fertile ground for attack. COPA gives those disapproving such conduct among minors, including prosecutors, the tools to criminalize such disapproved speech.

The World Wide Web contains a large amount of information about homosexual practices.[17] To the extent that this information is not already in danger under COPA because it deals with non-traditional sexual conduct such as sodomy, the fact that it relates to same-gender relationships is bound to cause many to label it unsuitable for minors. If such information is prohibited on the Web under COPA, adults also would be prevented from obtaining material that, as recognized in *Lawrence*, has social value for many adults.

B. COPA Is Substantially Overbroad Because It Restricts Artistic and Intellectual Expression.

The overbreadth of COPA threatens more than the dissemination of *information*, as in the examples just discussed. Its chilling effect is acutely felt among those who wish to use the Web for artistic or intellectual *expression*. COPA's "harmful-to-minors" test cannot offset this chill, for it utilizes an inquiry that is fundamentally subjective, and therefore flawed in its attempt to distinguish content that may be appropriate for minors from that which may be appropriate for adults. This is especially evident when evaluating whether any given example of expression possesses serious literary or artistic value for minors as opposed to adults.

Perhaps the best illustration of COPA's unconstitutional overbreadth is the posting of visual art on the Internet. Museum web sites provide information about their exhibits and also display actual works of art online. These museums, like many other content providers, have no cost-effective, reliable means of distinguishing adults from minors among their audience, and thus are reduced under COPA to censoring all of their posted artwork accordingly to a standard

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17. *See, e.g.*, The Body, *http://www.thebody.com* (AIDS and HIV information site); Mogenic, *http://www.mogenic.com/* (site providing columns, advice, forum for gay and lesbian individuals); Stop AIDS Project, "Oral Sex — Is It Safe?," *http://www.gay.com/*.

that permits only works deemed of serious value to minors, without regard to whether works failing that test still have serious value for adults. As the degree of subjectivity applicable to such evaluations of "serious value" increases, this overbreadth problem is magnified.

Online exhibits of the nude photography of Robert Mapplethorpe exemplify this point. Mapplethorpe's works have received both acclaim and extreme approbation, and an exhibit of his works on the web site of *amicus* California Museum of Photography at The University of California, Riverside (UCR) was a topic of discussion by both the district court and this Court in *Reno*.[18] The district court in *Reno* observed

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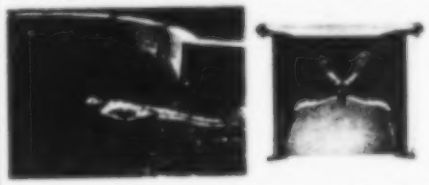
18. A picture of a UCR web page comparing the works of Weston and Mapplethorpe (which is still on the Web today, *http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*) was featured in briefs submitted to the district court and this Court in *Reno* by *amici* that included UCR:

Source: http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html

A comparison of *Weston's Nude Floating*, 1939 and Mapplethorpe's *Thomas*, 1986, provides one example of the shift in context presented by this exhibition.



Weston's *Nude Floating*, 1939, an image of a woman floating face up in a swimming pool, with Mapplethorpe's *Thomas*, 1986, an image of a nude man tautly posed in a square structure. Here, the modern, formal analysis usually applied to Weston's work expands to embrace postmodern themes rooted in societal relationships, gender, race, and sexuality. Likewise, Mapplethorpe's work examined next to Weston's invites the viewer to look beyond the lingering NEA controversy and see the image for its formal complexities in the tradition of modernist photography. In both cases the comparisons serve to more firmly ground the artists' work in 20th century art practice.

CAPTIONS:
Edward Weston, *Nude Floating*, 1939, Special Collections, UC/Santa Cruz.
Robert Mapplethorpe, *Thomas*, 1986, Robert Mapplethorpe Foundation. © 1986, Estate of Robert Mapplethorpe. Used by permission.

Other examples of Mapplethorpe's work that are posted on UCR's web site include: *Lisa Marie, http://www.photography.net/assets/duplicate1/maple003_Hnew.jpg*; *Lydia Cheng, http://www.photography.net/assets/duplicate1/maple004_Hnew.jpg*; and *Sonia Resika, http://photography.net/assets/duplicate1/maple005_Hnew.jpg*.

that the government had *conceded* that Mapplethorpe's photographs "would be patently offensive in some counties." *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996). This Court, in a part of its opinion quoting findings of the district court, stated —

> when the UCR/California Museum of Photography posts to its Website nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore and New York City, but also in Cincinnati, Mobile, and Beijing — wherever Internet users live.

521 U.S. at 854, quoting 929 F. Supp. at 844. This observation is equally pertinent to COPA, which includes within its scope all content "available to any minor." The Court of Appeals cited to the UCR web site in concluding that COPA threatens material such as that posted on the site. 322 F.3d at 267. Thus, despite all the efforts Congress devoted to making COPA narrower than the CDA, this artistic content, threatened before, remains threatened.

The Court of Appeals also relied on the Getty Museum's posting of *Woman with Meat Packer's Gloves* — described online by the museum as a "disturbing image of a [naked] woman piercing her own breast and abdomen with the sharp tips of meat packer's gloves" — as an example of web content that has serious artistic value for adults but not for minors when viewed as a single web page on the Internet. 322 F.3d at 267 n.35; *see* Getty Museum Collections, Paul Outerbridge, *Woman with Meat Packer's Gloves, http://www.getty.edu/art/collections/objects/o62648.html*. Ultimately, however, the Court of Appeals concluded that the image would have serious artistic value for minors when viewed in the context of the entire museum's collection, so as to remove it from COPA's reach. 322 F.3d at 267 n.35. Eager to reduce

COPA's scope so as to save its constitutionality, the Government agrees. Pet. Br. at 43-44. But that result is far from obvious, particularly with respect to 10- or 12-year-old minors who regularly are among Internet users. COPA would subject such art to standards befitting children rather than adults.

Woman with Meat Packer's Gloves

Paul Outerbridge
American, 1937
Three-color carbro print
Image: 15 5/8 x 9 3/4 in.
87.XM.66.2

Despite my considerable experience in the field of photography, I was for a long time unsure whether I would ever succeed in producing a good carbro print. Many of these pictures were produced with considerable technical difficulties unknown to today's users of more recent and much simpler color materials. Each shot cost $150, and many hours of work were necessary to produce it. Three different shots with varying exposures had to be made with three different color filters. After this, three separate

Source: *http://www.getty.edu/art/collections/objects/o62648.html*

The truth is that works of art often are provocative, which to many means that they are offensive and without value. *See generally National Endowment for the Arts v. Finley*, 524 U.S. 569, 574-75 (1998) (discussing works of Mapplethorpe and Andres Serrano). Disputes about the merit of artistic expression occur frequently in our country, such as when the Museum of International Folk Art, a branch of Santa Fe's Museum of New Mexico, displayed an artistic depiction of Our Lady of Guadalupe, the popular Hispanic image of the Virgin Mary. *See Santa Fe Madonna Sparks Firestorm*, Art in America, Jun. 1, 2001, No. 6, Vol. 89, p. 23. The image, by California artist Alma Lopez, was a computerized photo collage of the Virgin wearing a bikini of roses and held aloft by a buxom, bare-breasted angel. It is now posted by her on the Web (*Our Lady*, *http://www.almalopez.net/*). While Lopez based the image on her feminist Hispanic background and considered it reverential, Santa Fe residents responded with threats of censorship and the show's curator was accused of promoting "cyber porn." *Id.*

Controversies such as these prove that the subjectivity of artistic expression makes it fertile ground for a statute that requires courts to distinguish as a matter of law between content of value to minors and content of value to adults. There is much art already on the Web, including but not limited to photographic art, available on museum web sites and potentially within COPA's scope.[19] COPA's overbreadth endangers the availability of these works to adults and may ensure that additional works of artistic value to adults will never become available on the Web in the future.

Private art galleries face the same problem. Indeed, because art galleries tend to exhibit newer original works not yet vetted by the art world or accepted as at the level of inclusion in museum collections (and because they often display just single exhibitions rather than large museum-like displays) their problem may be heightened. For example, a Philadelphia art gallery that posts for sale a variety of nudes might reasonably be construed as satisfying COPA's definition of what is "harmful to minors," yet have serious artistic value for adults.[20] Art galleries abound on the Web, and examples of content that is of serious value to adult collectors yet might be deemed "harmful to minors" are not difficult to

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19. *See, e.g.*, Metropolitan Museum of Art, *Study of a Nude Man*, *http://www.metmuseum.org/collections/view1.asp?dep=11&item=52%2E71*; *Id.*, *Two Nudes Standing*, *http://www.metmuseum.org/collections/view1.asp?dep=19&full=1&item=1997%2E382%2E46*; UCR, California Museum of Photography, "Continuous Replay: The Photographs of Arnie Zane," *http://www.cmp.ucr.edu/photography/zane/default.html*; *id.*, *The Torsos*, *http://www.cmp.ucr.edu/photography/zane/torsos.html*; Guggenheim Museum of Modern Art, *Nude*, *http://www.guggenheimcollection.org/site/artist_work_lg_110_2.html*.

20. *See, e.g.*, More Gallery, Nelson Shanks, *Squeaky's Beads*, *http://www.moregallery.com/GifWrap1.asp?RecordNumber=549*.

find.[21] Moreover, although some (but clearly not all) of this art may not be intended by the content providers to appeal to the prurient interest, it should be beyond question that at least some materials that would not be viewed as erotic by adults nevertheless would appeal to the prurient interests of minors (the culturally classic example of National Geographic photographs may come to mind). According to COPA, so long as unshielded speech — including visual and artistic expression — lacks serious value to minors, it has no constitutional protection for adults on the Internet.

The First Amendment does not tolerate banning non-obscene art works from adult viewers merely because such works could be deemed harmful to minors. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 389 (1988). But COPA subjects art exhibited on the World Wide Web to precisely that damage. In this sense, COPA is just as overbroad, and just as chilling to freedom of expression, as was the CDA, despite Congress' efforts to narrow the statute's reach.

The *American Booksellers* decision illustrates the potential harm posed by COPA to *amici* like the Authors Guild and the American Society of Journalists and Authors. Many of the controversial literary works at issue in that case are on

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21. *See, e.g.*, the nudes of Edward Weston (*Nude, New Mexico, 1937, http://www.edward-weston.com/nudes/nude_new_mexico.html; Nude, 1936, http://www.edward-weston.com/nudes/nude_219n.html; Nude, 1927, http://www.edward-weston.com/nudes/nude_7n.html*); Tomasz Rut, *Tesoro, http://www.rutfineart.com/art/Tesoro.htm*; Motley Focus Locus, John F. Archer, Collograph Plates, *http://www.motley-focus.com/collograph.html*; *id.*, Shelley Feinerman, *The Princess and the Frog* (self portrait), *http://www.motley-focus.com/frogprincess.html*; and the untitled works of Pennsylvania artist Scott Church ("Welcome to My Daydream," *http://users.nbn.net/~schurch/*; The Art of Scott Church, *http://users2.nbn.net/~schurch/images/torso1.jpg*; *id.*, *http://users2.nbn.net/~schurch/images/hnc.jpg*); *id.*, *http://users.nbn.net/~schurch/outstudio.html*).

the Web.[22] These *amici* represent thousands of writers, any number of whom may want or need at some point to place their writings — essays, articles, poetry, short stories, and more — on the Web as well. The federal courts in *American Booksellers* were uncertain and divided as to whether James Joyce's *Ulysses* — a novel of recognized literary value to adults — was "harmful to minors." It therefore certainly is reasonable for other authors (and especially those not yet as widely received and studied as is Joyce) to feel uncertain about whether their own literary works might be viewed by some prosecutor or court as lacking in literary or artistic value for minors and therefore deemed in violation of this criminal statute. The only safe response to such reasonable concern is self-censorship, and the result is that the Web would then never see an inestimable amount of literary creations. Such a result would affect not only the authors, but also adult Web users who would be the poorer for the inevitable limitation of literary works available in this medium.

The multi-media nature of the Web, which transmits textual, graphic, audio, and visual material, enables artistic expression not readily reducible to print form to be fully available to both adults and minors. Music is a popular

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22. *See Commonwealth v. American Booksellers Assn.*, 236 Va. 168, 174-75, 372 S.E.2d 618, 622 (1988) (listing works at issue). In some cases, the works now on the Web are newer editions, or at least excerpts from the works. Examples include: R. Bell, *Changing Bodies, Changing Lives* (3d ed. 1998), *http://www.ourbodiesourselves.org/cbcl.htm* (excerpts); J. Collins, *Hollywood Wives: The New Generation* (2001), *http://www.jackiecollins.com/hollywood_wives_new_excerpt.html#excerpt* (excerpts); S. Donaldson, *Lord Foul's Bane* (1977), *http://netserver.massmedia.com/~mikeb/booktour/lord_fouls_bane.htm*; J. Joyce, *Ulysses* (1961), *http://www.bibliomania.com/0/0/29/61/frameset.html*; *Our Bodies Ourselves for the New Century* (1998), *http://www.ourbodiesourselves.org/excerpts.htm* (excerpts).

example. Popular and critically acclaimed songs are available on the Internet not only in text form (lyrics), but also in audio and video streams. The musical styles range from classical to rap, and the words range from staid to graphic.[23] Once posted, this music is available to adults and minors without distinction. Often, it is controversial. In 2003, an Emory University study published in the *American Journal of Public Health* reported on a possible link between rap music and videos, which often contain explicit sexual lyrics, and risky sexual behavior among African-American adolescent girls. *See* Emory Health Sciences Press Release, "Adolescents with High Exposure to Rap Music Videos Exhibit Higher Levels of Risky Health Behaviors," Feb. 28, 2003, *http://www.emory.edu/WHSC/HSNEWS/releases/feb03/rap.html*. Whether courts ultimately will determine that such expression lacks "serious . . . artistic . . . value for minors" cannot be answered neatly and with certainty by content providers, again illustrating that COPA unconstitutionally reduces content on the Web to only that deemed fit for children.

C. COPA Is Substantially Overbroad Because It Restricts Access to Materials of Educational Value to Adults.

The widespread use of the World Wide Web by educational institutions presents another example of the tension between online expression and the resulting overbreadth of

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23. *See, e.g.*, Public Enemy, *http://www.publicenemy.com/index.php?page=page5* (lyrics to songs by hit music group); Limp Bizkit Fan Site, *http://www.geocities.com/ResearchTriangle/Node/7156/sites/limpbizkit.html* (fan site with lyrics); Eminem, *http://www.eminem.com/* (providing Grammy-award winning music of artist Eminem); 50 Cent Online, 50 Cent, *In Da Club*, *http://www.50centonline.com/5.php* (Grammy-award nominated lyrics of artist 50 Cent); Lyrics On Demand, "Lil' John Lyrics: Get Low Lyrics," *http://www.lyricsondemand.com/l/liljonlyrics/getlowlyrics.html*.

COPA. The statute fails to acknowledge, let alone constitutionally reconcile, this tension, since "educational" value is not even listed in Section 231(e)(6)(C).

Recognizing the power of the Internet to transmit ideas, educational institutions have established a significant presence on the Web. Education and intellectual pursuit through those web sites perhaps best evidences the dual aspect of COPA's overbreadth that is at play here: the statute restricts not only content providers but also content seekers. As content providers, professors post course materials, and college and graduate students post academic work product, on the Web. But where the Web truly shines is in its ability to make a mind-boggling array of information and expression readily available to students in a wide variety of academic disciplines. Students of anything from abnormal psychology to sociology, gender studies to literature, photography to anthropology, and of course human sexuality, may plumb the Web for knowledge, ideas, and understanding of their own studies and of the wider world around them. As an essential part of the human experience, sexuality will inevitably be part of that process, sometimes in ways that some may believe appeal to prurient interests and lack serious value, at least for minors. It is axiomatic that, in narrowing content available on the Web to that which is not "harmful to minors," much that is valuable for adults would be lost. This result of COPA's overbreadth is the antithesis of the marketplace of ideas that the Web has come to exemplify.

An example of how educators use the Web to this dual purpose is provided by *amicus* Peter Ludlow, a Professor in the Department of Philosophy and the Department of Linguistics at the University of Michigan, who places online the course materials for his "Conceptual Issues in Cyberspace" and "Moral Reasoning" classes. *See, e.g.*, P. Ludlow, "High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace," *http://www-personal.umich.edu/~ludlow/highnoon.html*. The courses cover such issues as the nature of online sexual behavior in multi-user online games and application

of moral reasoning concepts to ethical dilemmas that arise in cyberspace. They include discussions of censorship on the Web — with sites threatened under COPA among the course materials. These items, intended for use by young adults in the university setting and of serious value to them academically, would be equally available to minors on the Internet.

The same is true of a course entitled "Sex and Gender in Pre-Modern Europe," offered in the History Department of the University of North Florida. The class web site for the 'Sex and Gender" history course states that the class syllabus, outline, and other handouts also have been made available on the Web precisely because "[t]he Internet is now a valuable research tool for students."[24] Required class readings include "primary documents available on the World Wide Web," and the site includes hyperlinks to those documents in full text. These linked documents include discussions of homosexuality by ancient Romans; classical descriptions of lesbianism; and an account of the gay subculture in early eighteenth-century London.[25] Under COPA's "harmful to minors" definition, the potential that these texts and images are subject to criminal prosecution is real, and the resulting uncertainty would be sufficient to chill this Web-based speech that has serious academic value for

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24. *See* University of North Florida, "Sex and Gender in Pre-Modern Europe," *http://www.unf.edu/classes/sexgender/* (class web site).

25. *See id.* (fn. 24, *supra*), linking to: Seneca, "Natural Questions" (excerpt), *http://www.fordham.edu/halsall/pwh/seneca-nq1-16.html*; Lucian, *Dialogues of the Courtesans*, "Leaena and Clonarium," *http://www.fordham.edu/halsall/pwh/lucian-court.html*; Rictor Norton, *Gay History & Literature*, "The Gay Subculture in Early Eighteenth-Century London," *http://www.infopt.demon.co.uk/molly2.htm*.

adults.[26] This threat again demonstrates that COPA is unconstitutionally overbroad.

CONCLUSION

The Government takes the Court of Appeals to task for identifying in its opinion "only" three examples of communications with serious value for adults that may be covered by COPA. Pet. Br. at 43. The Government does not say precisely how many examples it would require before conceding that COPA is so broad that it substantially encroaches on speech that is constitutionally protected for adults. Because the Internet is so vast, no court could fully catalogue all such speech. The several dozen examples set forth in this brief are but the tip of the iceberg, and that iceberg is growing and changing every day as the Internet continues to expand and to influence the way Americans communicate with each other and the rest of the world.

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26. For another example of an extensive collection of materials compiled for a course of study, *see* Grinnell College, "Unit 1," *http://web.grinnell.edu/courses/soc/s03/soc260-01/Unit1.html* (course materials for "Sociology 260 – Human Sexuality"). Additional examples include: Harvard University, "Lecture 11: Sexuality and Orgasm," *http://www.courses.fas.harvard.edu/~anth138/slides/lecture11/lecture11.htm* (lecture in course entitled, "The Behavioral Biology of Women," Anthropology 128, offered Fall 2003); *id.*, *http://www.courses.fas.harvard.edu/~anth138/slides/lecture11/Slide28.gif*; University of Virginia, "Gender Violence and Society," *http://toolkit.itc.virginia.edu/cgi-local/tk/UVa_CLAS_2004_Spring_SWAG203-1/displaymaterials:Moraga.Giving-Up-the-Ghost-Pt2.pdf?*; Rochester Institute of Technology, The School of Photographic Arts and Sciences, 1999 Student Honors Show, *http://www.rit.edu/~661www/student_work/honors_show_99/34.html*; Muhlenberg College, Art Department student work, *http://www.muhlenberg.edu/depts/art/Students/2000/Shira%20Helstrom.html*; University of Maryland, Student Photography Gallery, *http://student.btyroler.com/gallery/summer2002/*.

COPA's breadth far exceeds that which is necessary to accomplish any legitimate objective of Congress. It therefore is substantially overbroad and violates rights of free expression under the First Amendment. For the foregoing reasons, *amici curiae* urge the Court to affirm the decision of the Court of Appeals for the Third Circuit that preliminarily enjoined enforcement of the Child Online Protection Act, and to hold that COPA is unconstitutional.

Respectfully submitted,

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Dated: January 14, 2004.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The **American Society of Journalists and Authors** is a national organization of leading independent writers of non-fiction. Many of the members write on sexuality, science, medical, and marital issues. Some write directly for the World Wide Web; others write for the print media. In both cases, the works often are placed on the web. The Society and its members are concerned that COPA will prohibit its members' writings from being placed on the Web and will chill free expression online.

The **Authors Guild, Inc.** is a national association of more than 8,400 professional book and periodical writers of all genres, including journalists, historians, biographers, and other writers of fiction and nonfiction. Founded in 1912, it is the oldest and largest organization of published writers in the United States. Members of the Authors Guild include winners of the Pulitzer and Nobel Prizes, PEN/Faulkner and National Book Awards, Caldecott and Newbery Medals, MacArthur and Guggenheim Fellowships, and numerous other prestigious awards and prizes in literature and entertainment. The Authors Guild works to promote the professional interests of its members and to educate the community at large on issues facing publishing-related industries.

One of the Authors Guild's principal purposes is to express its members' views in cases involving questions of freedom of expression and to support that fundamental constitutional right. Many of its members rely heavily on the extraordinary opportunity for free and open communication offered by the World Wide Web, which allows its members to participate in a true "marketplace of ideas." The Authors Guild opposes COPA because it will chill free speech in this important forum.

Since 1993, the **California Museum of Photography at the University of California, Riverside** ("UCR/CMP") has been producing exhibitions on the Internet that combine both fine art and scholarship. The Museum promotes understanding of photography and related media

through collection, research, exhibition, and instruction, and is vitally concerned with the intersection of photography, new imaging media, and society. The Museum provides a supportive and challenging environment that stimulates discourse about issues relevant to the lives and interests of artists, scholars, and the general public. *See generally* UCR/CMP Information, *http://www.cmp.ucr.edu/photo/info.html#sheet/*.

The Museum is concerned that such online exhibits as a comparison of the work of photographers Edward Weston and Robert Mapplethorpe (*see http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*), Lucien Clergue's Nudes (*see http://www.cmp.ucr.edu/exhibitions/signs/*), and Robin Rosenweig's Three Bodies (*see http://www.cmp.ucr.edu/photography/bodies/*) may be restricted by COPA. The Museum has long championed use of the Internet as an expressive medium for both individual artists and for collaborative activities. Provisions in COPA could prohibit advanced scholarship in the visual arts, as well as practice by contemporary artists exploring the unique attributes of the Internet as a medium for pictorial discourse and active collaboration across state and international boundaries.

UCR/CMP hosts a Museum Store on its website and has joined the world's largest online bookstore, Amazon.com, to offer a comprehensive collection of fine art books, CDs, and videos through a link from its online Museum Store. Part of every purchase made through the Amazon.com link in the Museum Store is used to benefit the Museum. *See* UCR/CMP Museum Store, *http://www.cmp.ucr.edu/books/*. The store offers such books as *The Garden of Earthly Delights: Photographs by Edward Weston and Robert Mapplethorpe*, a scholarly catalog which centers on common themes investigated by Mapplethorpe and Weston and examines the contrasts and parallels among their still lifes, nudes, and portraits. UCR/CMP is concerned that making such scholarly works available to the public may be restricted by COPA.

Dr. Peter Ludlow is a Professor in the Department of Philosophy and Department of Linguistics at the University of Michigan and a consultant to information technology executives on Internet activities. He believes that materials that he uses to teach his classes and to consult, some of which now are also included in published books, may be within the scope of COPA. Professor Ludlow's practice is to place all of his course materials for his classes on his home page for access by his students, and he also places online materials that he uses in his consulting activity. Professor Ludlow provides links on his web site to publishers of his books. Professor Ludlow views COPA as directly targeting his ability both to teach and to consult and is concerned that his site may be considered commercial under COPA.

Among the classes taught by Professor Ludlow is a course entitled "Conceptual Issues in Cyberspace," which covers, in the online context, such philosophical issues as the nature of self and community. Professor Ludlow believes that COPA may prohibit him from placing on his site course materials relating to the nature of online sexual behavior in MUDs (multi-user interactive games played over the Internet) and other materials that are essential to the course but that may be termed "harmful to minors."

Professor Ludlow has also offered, and plans again in the future to offer, a course entitled "Moral Reasoning," which would apply traditional concepts in moral reasoning to the ethical dilemmas that arise in cyberspace. The class syllabus has included discussions of censorship on the Internet and COPA itself. Professor Ludlow believes he cannot comprehensively or meaningfully teach these issues without giving examples of communications that might be "harmful to minors" under COPA but which nevertheless are worthwhile communications, and that he cannot do so without violating COPA himself. Professor Ludlow has made available on his class web site most of the materials for the course, but believes he would be unable under COPA to provide online copies of the more controversial materials.

Safer Sex Institute ("SSI") is an unincorporated association for which Safersex.org is the service mark. Safersex.org is the oldest safer sex educational site on the Internet. The site has been repeatedly named as one of the "best of the net" Web sites and is mentioned in numerous CD-ROMs, college textbooks, and other popular books concerning sexuality and health on the Internet. Over 80,000 people per month examine the Web site. The information on the site includes discussions of sexual organs, sexually transmitted diseases, and other issues related to sexuality that could be considered "harmful to minors" according to particular community standards. *See* SaferSex.org, *www.safersex.org*.

The **Sexuality Information and Education Council of the United States (SIECUS)** is a national nonprofit organization incorporated in 1964 that develops, collects, disseminates, and promotes comprehensive information about sexuality, and advocates the rights of individuals to make responsible sexual choices. *See* SIECUS, *http://www.siecus.org/*. It believes that sexually explicit speech and visual materials are indispensable elements of sexuality education, and that COPA may restrict the appropriate professional use of such materials by sexuality educators, therapists, and researchers. *See id*.